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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DEREK DEAN, Defendant and Appellant.	B148514 (Super. Ct. No. MA020017)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ellen C. Deshazer, Judge. Affirmed.

Jill Lansing, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Brad D. Levenson, and Michael W. Whitaker, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Derek Dean, appeals from his convictions for inflicting corporal injury on a spouse (Pen. Code,[1] § 273.5, subd. (a)) and assault with a deadly weapon. (§ 245, subd. (a)(1).) Defendant admitted that he had previously been convicted of three serious felonies solely for purposes of sections 667, subdivisions (b) through (i) and 1170.12. Defendant argues the trial court improperly allowed opinion testimony on domestic violence or, in the alternative, he was denied effective assistance of counsel. Defendant also argues the trial court improperly instructed the jury with an incomplete version of CALJIC No. 9.00 and CALJIC Nos. 1.00, 17.41.1, and 17.42.[2] We affirm.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) Denise Johnson and defendant married in 1993. They divorced in 1995. However, they continued to see one another thereafter. In 1997, they had a daughter, Damani, together. Ms. Johnson was pregnant with their second child, Denia, on February 4, 2000. In addition, Ms. Johnson had two daughters from a prior relationship, Natashia and Lastacia. Ms. Johnson and defendant began living together again during January 2000. On February 4, 2000, defendant's mother, Eunice Barzar, and sister, Latanya Dean, visited defendant and Ms. Johnson to watch a televised basketball game.

Defendant told Ms. Johnson he wanted to take their daughter, Damani, with him to his mother's home. Ms. Johnson objected. They began arguing loudly and moved

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 At defendant's request, a sentencing issue has been withdrawn.

toward the kitchen. Ms. Barzar stood between Ms. Johnson and defendant. Ms. Johnson and defendant then went into the kitchen. At trial, Ms. Johnson testified she slipped on some grease in the kitchen, hitting her chin on the kitchen counter. However, on the day of the incident, she told Los Angeles County Sheriff's Deputy Michael Rodi that defendant had grabbed the back of her hair and pushed her face first into the kitchen counter, where she hit her chin. When interviewed by Detective Mark Richardson a few days after the February 4, 2000, incident, Ms. Johnson stated defendant pushed her, she slipped, and hit her chin on the counter.

When interviewed on February 4, 2000, Ms. Johnson told Deputy Rodi that after "blacking out" for some period, she attempted to get to the telephone. Defendant grabbed her shirt, dragged her into a bedroom, and began beating her about the head. Ms. Johnson curled up in a fetal position so that defendant would not harm her unborn baby. Defendant punched Ms. Johnson in her right thigh. Ms. Johnson told him, "You're going to kill our baby." Ms. Johnson asked Deputy Rodi not to leave the apartment until her uncle arrived. Ms. Johnson was afraid defendant would return. Ms. Johnson testified at trial that defendant did not drag her into the bedroom or hit her. Ms. Johnson's daughter, Natashia, spoke with Deputy Rodi. Natashia saw defendant drag Ms. Johnson into the bedroom. Defendant told Natashia not to follow him. Natashia believed defendant was going to kill Ms. Johnson. At trial, Natashia testified defendant and Ms. Johnson got into an argument. Natashia was afraid Ms. Johnson "was going to get hit." Natashia testified defendant did not push Ms. Johnson before she hit her face on the counter. Natashia was afraid Ms. Johnson would be sad if she said anything bad about defendant. Natashia did not remember if defendant drug Ms. Johnson by her hair into the bedroom. Natashia testified Ms. Johnson was screaming after being pushed by defendant into the bedroom. Natashia heard a sound like a slap.

Ms. Barzar testified at trial that defendant and Ms. Johnson got into an argument over his desire to take their daughter, Damani, with him for the weekend. During the argument, Ms. Johnson pulled away from defendant's attempt to hold her hand. In doing so, she stumbled. Defendant grabbed Ms. Johnson's shirt to catch her, but she hit her

chin on the counter. Defendant tried to look at Ms. Johnson's chin but she refused to allow him to do so. Ms. Johnson went to her bedroom. Defendant followed her, insisting she allow him to look at her chin. Both Ms. Barzar and Ms. Johnson repeatedly told defendant to leave. Natashia began screaming while Ms. Johnson was bleeding. Ms. Barzar testified she did not hear Ms. Johnson tell Deputy Rodi that defendant slammed her face into the counter and drug her into the bedroom by her hair. Ms. Barzar denied telling Deputy Rodi that she did not know what got into her son or why he was "acting like such a fool."

Dr. Loren Rauch treated Ms. Johnson at Antelope Valley Hospital on February 5, 2000. Ms. Johnson indicated she had pain to her face, neck, back, and abdomen as a result of an assault by her ex-husband. Ms. Johnson stated her injuries were caused by being struck with fists and being pushed or thrown down by defendant. Dr. Rauch noted Ms. Johnson had tenderness to the left side of her forehead and face, as well as the back of her head, thighs, and back. Dr. Rauch observed a laceration on Ms. Johnson's chin and "contusions" on her head, face, back, and thighs. Dr. Rauch took photographs of Ms. Johnson's injuries. Ms. Johnson reported a history of prior assaults by defendant. She told Dr. Rauch defendant had been in prison and had a long history of abuse. Based on that information, Dr. Rauch told Ms. Johnson she was at high risk for serious injury. When Dr. Rauch was shown photographs of Ms. Johnson, which were taken three days later, he indicated he believed the bruising noticeable on her neck could have been caused by the collar of her shirt as she was dragged by the shirt. Dr. Rauch was aware that pregnancy often triggers domestic violence and victims often deny their injuries were inflicted by their abuser.

Detective Richardson photographed Ms. Johnson's injuries on February 8, 2000. Ms. Johnson had a six-inch, U-shaped bruise around her neck as well as a three-inch cut on her chin. Gail Pincus, Executive Director of the Domestic Abuse Center, testified concerning domestic violence.

III. DISCUSSION

A. Domestic Violence Testimony

First, defendant argues the trial court improperly allowed Ms. Pincus to express opinions concerning battered women's syndrome that were irrelevant and unjustified. More specifically, defendant argues Ms. Pincus improperly testified regarding: his "propensity" for violence through testimony on the effects of violence on children of the abused woman; myths held by the general public about domestic violence; and the cycle of domestic violence.

1. Factual background

Ms. Pincus trained employees of the Los Angeles Police Department, Los Angeles County Sheriffs' Department, Los Angeles County District Attorney's Office, Los Angeles City Attorney's Office, and other law enforcement agencies about domestic violence. Ms. Pincus had testified concerning domestic violence over 100 times in state and federal court.

Ms. Pincus testified the effects on children who witness domestic violence can be profound. As an observer, the child oftentimes is able to better relate what actually occurred. The child witness often feels disloyal if they have described what occurred and the victim then decides not to prosecute. Ms. Pincus explained that the most common myth held by the public regarding domestic violence relates to why a battered woman would return to the relationship. The victims of the violence: are often ashamed; feel responsible; and feel they have failed. As a result, they do not feel open to speak about the violence. The public generally believes the victim is exaggerating.

Ms. Pincus explained the "cycle of violence" involves three phases: tension; actual physical violence; and the honeymoon. Another theory known as "the tactics of power and control" involves the "absolute need for power and control over the

victim . . . ." Ms. Pincus explained the perpetrator is often "charming, romantic, intense, but also rigid, and a rule setter, very often setting up two sets of rules." Once the commitment is made within the relationship, either through marriage, pregnancy, or cohabitation, the situation begins to change. The first sign is the batterer's criticism of the victim. For instance, he might tell her she overreacts, gets hysterical, is too sensitive, or has mood swings. Oftentimes, the next tactic involves emotional abuse, wherein the batterer accuses the victim of being fat, stupid, ugly, incompetent, and convinces her no one else would want her. The batterer may also isolate the victim by removing her from friends and family as well as all things with which she is comfortable. The batterer reinforces this separation by saying words to the effect of, "If you loved me, if you cared about me, if you want the relationship to work, then you would do this for me." Ms. Pincus explained how the abuse might begin with economic control. The batterer might get them into debt, hide his income, or not allow the victim to have access to his income. Ultimately, the victim believes she cannot live without him, so she will not leave.

Ms. Pincus testified once this is established, the batterer minimizes what he says or does. He convinces the victim she is overreacting or denies what he said or did. The batterer then begins with threats, coercion, and intimidation. This often involves weapons, if only displayed. It also can involve screaming, yelling, punching walls, and breaking things that are important to the victim. The batterer may use the children by undermining the victim's authority over them. The batterer may allow them to do what the victim has forbidden. Ms. Pincus explained this constant attack on the victim's identity as a woman as "male privilege." The batterer's masculinity is based on how much power and control he has over his woman and children. Ms. Pincus testified, "If he feels that he has been dishonored, disobeyed, disrespected, humiliated, or embarrassed by his woman, a woman he sees more as his property, something that he owns rather than as a partner whom he loves and adores, then he feels that he has a God-given right to do whatever he needs to do to her to put her back in her place, to teach her a lesson, to let her know who's boss, to regain his power and control within that relationship." Violence

is the end result. The violence begins with pushing, shoving, hair pulling, dragging, and escalates to closed fists, kicks, chokes, or rape. Oftentimes, guns and knives are used to threaten the victim.

Ms. Pincus testified the batterer is afraid of: going to jail; having the victim leave; and having people discover what goes on behind closed doors. If he fears this, he will become apologetic and make promises to change. By doing so, he brings the victim back into the relationship. Oftentimes, the batterer wants to engage in sex with the victim to assure that everything is okay. If the batterer is arrested, he often calls the victim repeatedly and either threatens her or alternatively expresses his love for her.

In this scenario, Ms. Pincus testified, the woman suffers from battered women's syndrome. She trusted the man when the relationship began and begins to believe his belittling and criticism. She looks for truth in his criticism. She often backs down, gives in, and compromises. The victim looks to the batterer for everything, to the point where she does not trust how she feels. When the violence occurs, the victim often leaves. However, she does not tell anyone what happened. The batterer seeks her out, apologizes, and makes promises. The victim returns hopeful that things will change. However, the violence usually increases in severity over time. The victim often develops post traumatic stress disorder. She becomes emotionally numb, depressed, and is unable to concentrate.

When an incident endangers the victim to the point where she feels she or her children may be permanently injured or killed, a window might open to allow her to do something about the situation such as call the police or leave. However, the window is of brief duration. If the victim doubts what she has done or begins to feel guilty and responsible, she may look at the police, prosecutor, and court system as the enemy. The victim often recants her story and does whatever the batterer tells her to do. Ms. Pincus's experience was that violence often escalated during a pregnancy. Ms. Pincus believed that the threat of injury to an unborn child and immediate contact with a physician after violence might afford a window of opportunity for the victim to express what is going on in a relationship. Ms. Pincus was of the opinion that a child would have difficulty

testifying about a violent incident in front of a father or step-father. In addition, if the victim was recanting her story, the child might feel disloyal by testifying.

2. Waiver

Preliminarily, the Attorney General argues all of defendant's contentions have been waived. We agree that defendant's failure to object to those portions of Ms. Pincus's testimony that he now regards as unduly prejudicial constitutes a waiver of the issue on appeal. (Evid. Code, § 353, subd. (a); *People v. Coleman* (1988) 46 Cal.3d 749, 777; *People v. Gates* (1987) 43 Cal.3d 1168, 1185; *People v. Ghent* (1987) 43 Cal.3d 739, 766; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1126; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1386; 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, §§ 371-373, pp. 459-462.)

3. Admissibility

Notwithstanding that waiver, we find the evidence in question was relevant and could properly be presented to the jury. We review this issue for an abuse of discretion. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299, citing *People v. Kelly* (1976) 17 Cal.3d 24, 39.) Evidence Code section 1107 provides in pertinent part: "(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge. [¶] (b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. . . ." We found in *People v. Gadlin* (2000) 78 Cal.App.4th 587, 592, "[A] properly qualified expert may testify to [battered women's syndrome] when it is relevant to a contested issue at

trial other than whether a criminal defendant committed charged acts of domestic violence." (See also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1076, 1082; *People v. Gomez* (1999) 72 Cal.App.4th 405, 415; *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1213-1217.)

There are two components to the relevance analysis in this case. There must be sufficient evidence to support the theory that the battered women's syndrome applies to the victim. (*People v. Gadlin, supra,* 78 Cal.App.4th at p. 592; *People v. Gomez, supra,* 72 Cal.App.4th at p. 415.) In addition, there must be a contested issue to which the battered women's syndrome is probative. (Evid. Code, § 801; *People v. Gadlin, supra,* 78 Cal.App.4th at p. 592.) Defendant argues: "With no evidence that either the characteristics or the behavior described in the syndrome applied to [defendant], the testimony painted a terrifying picture and invited the jury to draw the conclusion that this was an accurate portrayal of [defendant], the relationship, and the suffering experienced by [Ms.] Johnson." We disagree. Unlike the factual scenario in *People v. Gomez, supra,* 72 Cal.App.4th at page 415, upon which defendant relies, there were prior incidents of violence by defendant in this case. When treated by Dr. Rauch, the day after the incident occurred, Ms. Johnson reported a history of prior assaults by defendant. Ms. Johnson told Dr. Rauch defendant had been in prison and had a long history of abuse. In addition, defendant and Ms. Johnson had a checkered relationship, having been married, divorced, dated, and separated on numerous occasions for over five years, then reunited only a few weeks before the incident occurred. Detective Richardson asked Natashia: "[H]as [defendant] ever put his [] hands on [Ms. Johnson], pushed her or shoved -- anything like that?" Natashia responded, "Yeah." Ms. Barzar testified there was apparent tension or "undercurrents" between defendant and Ms. Johnson the evening the assault occurred. The facts in this case are more similar to those in *People v. Morgan, supra,* 58 Cal.App.4th at pages 1212-1213, where the victim told the police that the defendant had hit her in the past, "but never as badly as on this occasion." (*Id.* at p. 1213.)

Defendant argues that Ms. Pincus could not have testified regarding all aspects of battered women's syndrome unless there was evidence they existed in the specific case

being tried. We disagree. In *People v. Gadlin, supra,* 78 Cal.App.4th at page 595, we held: "When [battered women's syndrome] is properly admitted, testimony about the hypothetical abuser and hypothetical victim is needed for [battered women's syndrome] to be understood. To the extent that the expert testimony suggests hypothetical abuse that is worse than the case at trial, it may even work to the defendant's advantage." (*Id.* at p. 595.) In *Gadlin*, the defendant and victim, as here, had "a troubled, 'off-again, on-again' relationship for two and one-half years . . . ." (*Id.* at p. 590.) The defendant in *Gadlin* came home under the influence of drugs, tried to choke the victim, dragged her into a bedroom, and was holding a knife to her neck when police arrived. The victim told the police she was extremely afraid of the defendant. The victim related that he was constantly terrorizing her. Also, according to the victim, the defendant was threatening her children. The victim later wrote a letter of recantation to the parole board on defendant's behalf. Following a one-year period of incarceration for a parole violation, defendant and the victim reunited. However, when the victim tried to end the relationship, the defendant: pushed her to the floor; grabbed a knife; and cut the victim from her temple to the middle of her cheek and on her back, neck, abdomen; and he cut three of her fingers. (*Ibid.*) We held there was sufficient evidence the battered women's syndrome applied in the *Gadlin* case based on two distinct incidents of assault, recantation by the victim, and resumption of an intimate relationship with the defendant. (*People v. Gadlin, supra,* 78 Cal.App.4th at p. 594.) We noted: "[Battered women's syndrome] evidence speaks directly to both recantation and reunion by a domestic abuse victim, especially where such actions are used to attack her credibility. (*People v. Morgan, supra,* 58 Cal.App.4th at pp. 1215-1217.)" (*People v. Gadlin, supra,* 78 Cal.App.4th at p. 594.) Ms. Pincus's testimony could properly be admitted in this case where the victim recanted her prior statements to police.

We likewise reject defendant's argument that Ms. Pincus's testimony coupled with the prosecutor's argument constituted the use of "propensity evidence of general traits, which were never factually connected to [defendant]." In response to the prosecutor's questions, Ms. Pincus testified: she did not know anything about this case; had never met

defendant, Ms. Johnson, or Natashia; had not read any police reports regarding this case; and formed no opinion about the parties or whether they were battered. Moreover, in compliance with the provisions of section 1107, the jury was instructed with CALJIC No. 9.35.1 as follows: "Evidence has been presented to you concerning battered women's syndrome. This evidence is not received and must not be considered by you to prove the occurrence of the act or acts of abuse, which form the basis of the crimes charged. [¶] Battered women's syndrome research is based upon an approach that is completely different from the approach which you must take to this case. The syndrome research begins with the assumption that physical abuse has occurred, and seeks to describe and explain common reactions of women to that experience. As distinguished from that research approach, you are to presume the defendant innocent. The People have the burden of proving guilt beyond a reasonable doubt. [¶] You should consider this evidence for certain limited purposes only. Namely, that the alleged victim's reactions, as demonstrated by the evidence, are not inconsistent with her having been physically abused, or the beliefs, perception, or behavior of victims of domestic violence." The jury was also instructed with CALJIC No. 2.82 that counsel may ask hypothetical questions a witness offering opinion testimony. The instruction cautions: "In permitting such a question, the court does not rule and does not necessarily find that all the assumed facts have been proved. It only determines that those assumed facts are within the possible range of the evidence. It is for you to decide from all the evidence whether or not the facts assumed in a hypothetical question have been proved." These instructions clearly cautioned the jurors that Ms. Pincus's testimony was *not* to be construed as propensity evidence. The California Supreme Court has consistently stated that on appeal it is presumed that jurors followed the instructions they were given. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1337; *People v. Osband* (1996) 13 Cal.4th 622, 714; *People v. Kemp* (1961) 55 Cal.2d 458, 477; *People v. Chavez* (1958) 50 Cal.2d 778, 790; *People v. Foote* (1957) 48 Cal.2d 20, 23; *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1333-1334.)

Moreover, defendant takes the portion of the prosecution's argument, which he attributes as "propensity evidence," out of context. The prosecutor explained that evidence was introduced which suggested defendant had committed prior acts of domestic violence. The prosecutor argued: "You can evaluate that whether he was the type of person to have committed that crime. And if he committed that prior domestic violence, in your opinion, you can make the determination, if you choose, that he is the kind of person that commits domestic violence against women. [¶] If you make that inference, you may, but are not obligated to, you may infer he's the kind of person that committed this crime. The Legislature only allows us some very certain areas. They don't take away the reasonable doubt standard. It's still the same standard. You must still make a determination beyond a reasonable doubt that the defendant committed these crimes." The prosecutor then explained that the reason the Legislature allowed the jurors to make the inference that defendant is the type of person that commits domestic violence was because the abusers involved in battered women's syndrome repeat their behavior. Only then did the prosecutor state, "If they are the type of people that commit domestic violence, the pattern will repeat itself more frequently and increase in severity." The prosecutor's argument does not, therefore, suggest defendant had a propensity to commit the crime and should therefore be found guilty.

4. Effectiveness of counsel

Defendant argues if we find the issue of the admissibility of the battered women's syndrome evidence was waived, he was denied ineffective assistance of counsel. Before ineffective assistance of counsel may be found, there must be proof not only that the defense attorney's performance was deficient but also that defendant suffered prejudice as a consequence. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Horton* (1995) 11 Cal.4th 1068, 1122; *In re Fields* (1990) 51 Cal.3d 1063, 1068-1069; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) Furthermore, we engage in a presumption, which it is defendant's burden to overcome, that trial counsel's performance comes

within the wide range of reasonable professional assistance and that his or her actions were a matter of sound trial strategy. (*Strickland v. Washington, supra,* 466 U.S. at pp. 689-690; *People v. Lewis* (1990) 50 Cal.3d 262, 288.)

As set forth above, the battered women's syndrome testimony could properly be admitted in its entirety. (*People v. Gadlin, supra,* 78 Cal.App.4th at pp. 594-595.) As a result, defense counsel had no obligation to object to admissible evidence. (*People v. Mendoza* (2000) 24 Cal.4th 130, 171; *People v. Cudjo* (1993) 6 Cal.4th 585, 626-627.) Moreover, defendant has failed to demonstrate that had the objections he now asserts been interposed, there was a probability they would have been sustained. Finally, as is often the case when an ineffective assistance of counsel contention is posited on appeal, there is an insufficient basis to explain why no objection was interposed. (*People v. Lawley* (2002) 27 Cal.4th 102, 133, fn. 9; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Defense counsel reasonably could have concluded Evidence Code section 1107, subdivision (a) would render any objection futile.

B. Instructions

1. Intent element of assault

Defendant argues the trial court erroneously instructed the jury with a version of CALJIC No. 9.00 defining assault because the instruction did not include the intent element added by a 1998 revision. Defendant further argues the omission constitutes federal constitutional error. CALJIC No. 9.00 was given as follows: "Every person who commits an assault upon another person is guilty of a violation of Penal Code section 240, a misdemeanor. [¶] In order to prove an assault, each of the following elements must be proved: [¶] A person willfully committed an act which by its nature would probably and directly result in the application of physical force on another person; [¶] At the time the act was committed, the person had the present ability to apply physical force to the person of another. [¶] Willfully means that the person committing the act did so

intentionally. [¶] To constitute an assault, it is not necessary that an actual injury be inflicted. However, if any injury is inflicted, it may be considered in connection with other evidence in determining whether an assault was committed." The instruction did not include language added to CALJIC No. 9.00 in 1998, "At the time the act was committed, the person intended to use physical force upon another person or to do an act that was substantially certain to result in the application of physical force upon another person . . . ." The comment that follows the revised version of CALJIC No. 9.00 notes that the paragraph was bracketed because it was uncertain the circumstances under which the Supreme Court would require a jury be so instructed. (Com. to CALJIC No. 9.00 (2001 supp.) p. 150.) Defendant argues the failure to instruct the jurors that they must find he intended to do an act substantially certain to result in the application of physical force upon another person resulted in a denial of due process.

The California Supreme Court recently addressed this issue in *People v. Williams* (2001) 26 Cal.4th 779, 790, where the jury was read an instruction similar to the one given here. In *Williams*, the Supreme Court found, "[U]nder the instruction given, a jury could conceivably convict a defendant for assault even if he did not actually know the facts sufficient to establish that his act by its nature would probably and directly result in a battery." (*Ibid.*) However, the *Williams* Court found, "[A]ny instructional error is largely technical and is unlikely to affect the outcome of most assault cases, because a defendant's knowledge of the relevant factual circumstances is rarely in dispute." (*Ibid.*) We agree with the Attorney General that in this case the alleged ambiguity was harmless because the jury, through its verdict on the spousal battery, necessarily concluded that defendant intended to injure Ms. Johnson. (*People v. Breverman* (1998) 19 Cal.4th 142, 175 [error may be deemed harmless if the issue which would have been presented by an omitted instruction is necessarily resolved adversely to defendant under other proper instructions]; *People v. Prettyman* (1996) 14 Cal.4th 248, 276 [same].)

2. CALJIC Nos. 1.00, 17.41.1, and 17.41.2

Defendant argues that the trial court improperly instructed the jury with CALJIC Nos. 1.00, 17.41.1, and 17.41.2, because, "The instructions . . . prevented the jurors from exercising their community conscience and traditional power to nullify the law if they chose to do so." Defendant further argues the instructions undermined his right to a jury trial as well as the right to "the independent, impartial decision of each juror and to a unanimous jury." He also argues the instructions unduly intruded on the sanctity of the deliberative process. Defendant objects to the language of CALJIC No. 1.00 as given, "You must accept and follow the law as I state it to you, whether or not you agree with the law." He further object to CALJIC No. 17.41.1, which was given as follows: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation." Finally, defendant objects to the following language of CALJIC No. 17.42: "In your deliberations do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict."

There is no juror nullification right. (*People v. Williams* (2001) 25 Cal.4th 441, 463; *People v. Brown* (2001) 91 Cal.App.4th 256, 270-271.) As was recently pointed out in *People v. Cline* (1998) 60 Cal.App.4th 1327, 1335: "Courts have long recognized that 'a jury, in rendering a general verdict in a criminal case, necessarily has the naked *power* to decide all the questions arising on the general issue of not guilty; but it only has the *right* to find the facts, and apply to them the law as given by the court.' (*People v. Lem You* (1893) 97 Cal. 224, 228 [], . . . overruled on another ground in *People v. Kobrin* (1995) 11 Cal.4th 416, 427, fn. 7 [].) Because juries have no right to disregard the court's instructions, it is inappropriate to instruct juries on their power to nullify the law. [Citation.]" (Original italics; *People v. Nichols* (1997) 54 Cal.App.4th 21, 24-26.)

Moreover, as the California Supreme Court recently noted, "The need to protect the sanctity of jury deliberations, however, does not preclude reasonable inquiry by the court into allegations of misconduct during deliberations." (*People v. Cleveland* (2001) 25 Cal.4th 466, 476.)

With those precepts in mind, we turn to the instructions in question. The California Supreme Court has held: "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.]" (*People v. Burgener* (1986) 41 Cal.3d 505, 538, disapproved on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 750-754; *People v. Holt* (1997) 15 Cal.4th 619, 677 [instructions are not considered in isolation].) Much of CALJIC Nos. 1.00, 17.41.1, and 17.41.2 reiterate other properly given instructions. For instance, CALJIC No. 17.40 instructed the jurors: "The People and the defendant are entitled to the individual opinion of each juror. [¶] Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors." Finally, pursuant to CALJIC No. 1.03, they were instructed: "You must not independently investigate the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not, on your own visit the scene, conduct experiments, or consult reference works or persons for additional information." Moreover, the California Supreme Court has determined that CALJIC No. 17.42 precluding the discussion or consideration of penalty or punishment or allowing these subjects to in any way affect their verdict is a proper instruction. (See *People v. Allison* (1989) 48 Cal.3d 879, 892, fn. 4.; *People v. Hill* (1992) 3 Cal.App.4th 16, 46, disapproved on another point in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5.)

When the instructions are taken as a whole, there is no likelihood the jurors' duty to find guilt beyond a reasonable doubt was undermined by CALJIC Nos. 1.00, 17.41.1, and 17.41.2. There was no likelihood the instructions as a whole misled the jurors. Defendant's contention to the contrary is without merit. (See *Boyde v. California* (1990)

494 U.S. 370, 380; *People v. Holt, supra,* 15 Cal.4th at p. 677; *People v. Burgener, supra,* 41 Cal.3d at pp. 538-539.) Finally, under any standard of reversible error, the alleged error was entirely harmless given the uncontradicted nature of the overwhelming and conclusive proof of guilt. (*Chapman v. California* (1967) 386 U.S. 18, 22; *People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Molina* (2000) 82 Cal.App.4th 1329, 1335-1336.)

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.